No. 99-1823

IN THE

Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

WAFFLE HOUSE, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 64 national and international labor organizations representing 13 million working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.[1]

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, authorizes the Equal Employment Opportunity Commission to bring federal court suits in its own name and on its own and the public's behalf seeking, among other forms of relief, "reinstatement . . . of employees, with . . . backpay (payable by the employer . . . responsible for the unlawful employment practice)." 42 U.S.C. § 2000e-5(g)(1). In order to avoid what the Fourth Circuit perceived as a policy conflict between this provision of Title VII and the Federal Arbitration Act, the court below ruled that the EEOC may not seek reinstatement and back pay for a charging party who had agreed to arbitrate employment disputes with his employer.

By authorizing the EEOC to bring suit, the 1972 amendments were intended to provide the Commission with an independent coercive enforcement power that is complete in itself and that is sufficient to move recalcitrant employers into compliance with Title VII. The most potent remedies in this respect are those that threaten employers with monetary liability for disobeying the federal anti-discrimination laws.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made monetary contribution to the preparation or submission of this brief.

By depriving the EEOC of just these potent remedies, the decision below substantially defeats the purpose of the 1972 amendments.

There is nothing in the Federal Arbitration Act that even implicitly limits the enforcement authority of the EEOC. The FAA was intended to make arbitration agreements enforceable on the same footing as other contracts. As a general matter, a contract is only enforceable against the parties to the agreement. The EEOC has not agreed to arbitrate any dispute. And, the charging party who has agreed to arbitrate does not have authority to enter into a private agreement with an employer that deprives the Commission of an essential aspect of its law enforcement authority.

ARGUMENT

This lawsuit, brought by the Equal Employment Opportunity Commission pursuant to the enforcement procedure stated in Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, arises from the discharge of a Waffle House employee allegedly in violation of the Americans with Disabilities Act ("ADA"). *See* 42 U.S.C. § 12117(a).

At this juncture, as the Fourth Circuit stated, the question presented is:

> [W]hether and to what extent the Equal Employment Opportunity Commission ("EEOC"), in prosecuting a suit in its own name, is bound by a private arbitration agreement between the charging party and his employer. [Pet. App. 1a-2a].

That question was generated by the following particulars:

> (i) Waffle House requires applicants for employment to complete a "generic, corporation-wide employment application" containing an "arbitration provision," Pet. App. 7a, "requiring the applicant to submit to binding arbitration 'any dispute or claim concerning Applicant's

> employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc, or the terms, conditions or benefits of such employment,'" Pet App. 3a;
>
> (ii) the EEOC brought suit against Waffle House—on the basis of charges filed by an employee who had completed an application including the arbitration provision—alleging that the Company had discharged the employee in violation of the ADA and seeking an injunction requiring that Waffle House cease such unlawful practices, institute anti-discrimination programs, and reinstate the discharged employee, as well as backpay and compensatory and punitive damages, *id.* at 4a; and
>
> (iii) Waffle House responded by filing a petition under the Federal Arbitration Act to compel the EEOC to take its case to arbitration and a motion to stay or dismiss the EEOC's lawsuit, *id.*

The correct answer to the question posed by the Court of Appeals is that the EEOC—which has no arbitration agreement with Waffle House—"in prosecuting a suit in its own name," is *not* "bound by," or otherwise limited by, "a private agreement between the charging party and his employer."

The answer given by the court below, in contrast, was:

> (1) that the EEOC cannot be compelled by reason of an arbitration agreement between the charging party and his employer, to arbitrate its claims, but (2) that, to the extent that the EEOC seeks to obtain "make-whole" relief on behalf of a charging party who is subject to an arbitration agreement, it is precluded from seeking such relief in a judicial forum. [Pet. App. 2a.]

The Court of Appeals fashioned that limitation on the EEOC's litigation authority out of what that court characterized as "competing federal polic[ies]" reflected in the Title VII enforcement scheme and the Federal Arbitration

Act ("FAA"). Pet. App. 14a. According to the court below, "[t]he EEOC's public mission to eradicate and to prevent discrimination . . . cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims." *Id.*

But there is no Title VII/FAA conflict that justifies any such judicially-created limitation on the EEOC's litigation authority stated in Title VII—as we now show.

A. Title VII, as amended in 1972, puts in place a dual EEOC public-law-enforcement/"person aggrieved" private-party-law-enforcement scheme. The salient point here is that the public law enforcement component of that scheme lodges in the EEOC a litigation authority to bring suit in its own name and on the public's behalf to remedy unlawful discriminatory practices that is both complete in itself and independent of, and indeed paramount to, the separate private party litigation authority accorded to aggrieved persons to bring a suit against the discriminatory practice in question.

In this regard, "Title VII sets forth an integrated, multistep enforcement procedure that enables the Commission to detect and remedy instances of discrimination." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). "[F]ollow[ing] a straightforward reading of the statute," § 706 of Title VII "authorize[s] the EEOC to sue in its own name to enforce the federal law by obtaining appropriate relief for those persons injured by discriminatory practices forbidden by the Act." *General Telephone Co. v. EEOC*, 446 U.S. 318, 324-325 (1980).[2] When the EEOC exercises that authority the Commission is the plaintiff both in name and in fact and the

[2] Section 706 provides that an action to enforce a claim may be brought by a person aggrieved in the event that "the Commission has not filed a civil action" or "entered into a conciliation agreement to which the person aggrieved is a party" within 180 days after the filing of a charge. 42 U.S.C. 2000e-5(f)(1).

claims stated in the complaint are the EEOC's claims; "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." *Id.* at 326.

Section 706, first of all, expressly authorizes "the Commission [to] bring a civil action against any [private] respondent" in the appropriate United States district court. 42 U.S.C. § 2000e-5(f)(1). That section also specifically provides that "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the [EEOC's] complaint the court"

> may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative relief as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. [42 U.S.C. § 2000e-5(g)(1).]

As the *General Telephone* Court put the point:

> Section 706(f)(1) specifically authorizes the EEOC to bring a civil action against any respondent not a governmental entity upon failure to secure an acceptable conciliation agreement, the purpose of the action being to terminate unlawful practices and to secure appropriate relief, including "reinstatement or hiring . . ., with or without back pay," for the victims of the discrimination. See § 706 (g). [446 U.S. at 323-324 (footnote omitted).]

See Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co., 514 U.S. 122, 133 (1995).

In assessing the meaning and effect of § 706, it is particularly pertinent that as originally enacted Title VII did not grant the EEOC any enforcement authority and that "the recalcitrance of many employers compelled Congress in 1972 to strengthen the EEOC's investigatory and enforcement powers." *Shell Oil*, 466 U.S. at 77. The aim of the 1972 amendments was precisely to arm the EEOC with "coercive enforcement powers," so that the Commission would be more than a "conferee, conciliator and uncoercive persuader." *EEOC v. General Electric Co.*, 532 F.2d 359, 372 (4th Cir. 1976). The Senate Report explained the source of the "impasse between EEOC and the employer[s]" that "played a large part in the present failure of Title VII," S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971), as follows:

> The employer realizes that any attack on its policies by the EEOC presents largely an ineffectual threat. To comply with the Commission's interpretation of a problem, and to accord the appropriate relief, is a purely voluntary matter with the respondent with no direct legal sanctions available to EEOC. This absolute discretion available to respondents has not proven conducive to the success of Title VII objectives. In cases posing the most profound consequences, respondents have frequently ignored the EEOC's findings, preferring rather to chance the unlikelihood that the complainant will pursue his claim further through the costly and time-consuming process of court enforcement. The social consequences have been extreme.[3]

Underscoring the dissatisfaction with Title VII's original enforcement scheme, the Senate Report added that "the Congressional establishment of the EEOC without adequate enforcement" means had "proved to be a cruel joke to those

[3] *See* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 11 (1971) ("one of the main advantages of granting enforcement power to a regulatory agency is that the existence of the sanction encourages settlement of complaints before the enforcement stage is reached").

complainants who ha[d] in good faith turned to the Federal government with the complaint of discrimination." *Id.* at 8. The obvious solution to this problem was to "provid[e] the Commission with effective power to enforce Title VII." *Id.* at 28.

The 1972 grant to the EEOC of authority to secure back pay awards for discriminatees was central to achieving the Congressional purpose, for the reasons this Court cogently stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). "The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions." *Id.* at 416. Given the "economic character" of the discrimination Title VII was intended to eliminate, *id.* at 418, "[b]ackpay has an obvious connection with this purpose," *id.* at 417:

> If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *United States v. N.L. Industries, Inc.*, 479 F.2d 354, 379 (CA 8 1973). [422 U.S. at 417-418.]

Putting the foregoing together, the overall purpose of the 1972 amendments was this:

> As Title VII was originally enacted as part of the Civil Rights Act of 1964, the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion." Civil actions for enforcement upon the EEOC's inability to secure voluntary compliance could be filed only by the aggrieved person. § 706 (e), 78 Stat. 260. Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proven

> to be a major flaw in the operations of Title VII." S. Rep. No. 92-415, p. 4 (1971). The 1972 amendments to § 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII. In so doing, Congress sought to implement the public interest as well as to bring about more effective enforcement of private rights. [*General Telephone*, 446 U.S. at 325-326 (footnote omitted).]

Of equal moment here, the structure of the Title VII enforcement scheme enacted in 1972 reflects "the congressional contemplation . . . that there should be primary reliance upon the powers of enforcement . . . conferred upon the Commission, and not upon private lawsuits, to achieve equal employment opportunity." *EEOC v. Cleveland Mills Co.*, 502 F.2d 153, 156 (4th Cir. 1974), *cert. denied*, 420 U.S. 946 (1975). The court below accurately catalogued the essentials of the independent law enforcement authority complete in itself that Congress granted to the EEOC in the public interest:

> In order to preserve the EEOC's authority to litigate selectively those cases which it believes will have the most significant public impact, a charging party "may not proceed to federal district court until . . . the EEOC has made its own determination as to the validity of complainant's claim and issued a right-to-sue letter." *Davis v. North Carolina Dep't of Correction*, 48 F.3d 134, 138 (4th Cir. 1995). And if the EEOC chooses to file suit, the charging party may not bring his own suit; his right is them limited to intervening in the EEOC's suit. *See* 42 U.S.C. § 2000e-5(f)(1). * * * In addition, once the EEOC decides to sue in its own name, it is not limited to the facts presented in the charge. Rather, the EEOC may sue based on "[a]ny violations that [it] ascertains in the course of a reasonable investigation of the charging party's complaint." *General Tel.*, 446 U.S. at 331; *see also General Elec.*, 532 F.2d at 370. Finally, the EEOC's independent interest is also reflected in the fact that a charging party may not withdraw his charge without the consent of the EEOC. *See* 29 C.F.R. § 1601.10. [Pet. App. 9a-10a.]

To draw out the implications of the last two points, the EEOC has express authority to bring suit to vindicate the rights of discriminatees who have never filed a charge with the Commission and of charging parties who wish to withdraw their charge from the Commission. Beyond that, the EEOC may itself initiate a case without any discriminatee having filed a charge by proceeding on a Commissioner's charge. 42 U.S.C. § 2000e-5(b). In addition the statute expressly empowers "the Commission [to] bring a civil action" where "the Commission has been unable to secure . . . a conciliation agreement *acceptable to the Commission*" without regard to whether the discriminatee and the employer who engaged in the discriminatory practice have entered into a private conciliation agreement or some other private settlement. 42 U.S.C. § 2000e-5(f)(1) (emphasis added).[4]

As all this makes plain, "[t]he Commission has the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, p. 14. As a means to that end, and most particularly to encourage compliance with the federal anti-discrimination laws, the EEOC has been granted by Congress an independent public law enforcement authority to seek the full range of remedies for discriminatory practices stated in § 706. Such an EEOC suit—including a suit concerning discrimination against named discriminatees seeking reinstatement and back pay for the discriminatees—is law

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[4] Conversely, the statute allows an aggrieved person to bring suit 180 days after the charge was filed if "the Commission has not filed a civil action . . . or the Commission has not entered into a conciliation agreement *to which the person aggrieved is a party*." *Id.* (emphasis added).

enforcement for and on behalf of the public; "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." *General Telephone*, 446 U.S. at 326.

Against that background what the Fourth Circuit rule denying the EEOC authority to seek back pay where the discriminatees in question have signed arbitration agreements would do is to recreate the situation the 1972 amendments were intended to remedy, i.e., one in which "the EEOC presents largely an ineffectual threat" because "no direct legal sanctions [are] available to EEOC." S. Rep. No. 92-415, at 5. The only sanction left to the EEOC by the decision below is injunctive relief. As this Court has recognized, this is insufficient in that "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality." *Albemarle Paper*, 422 U.S. at 417. *See* H.R. Rep. No. 40, 102d Cong., 1st Sess. 69 (1991) ("when back pay is not available . . . there is simply no deterrent"). And, the threat of back pay liability through arbitration proceedings brought by individual claimants will provide little deterrence, because, just as occurred under the 1964 Civil Rights Act, "respondents [will] more often than not shrug[] off the Commission's entreaties and rel[y] upon the unlikelihood of the parties suing them." H.R. Rep. No. 92-238, p. 9.

The Sixth Circuit was surely correct in its assessment that "limiting the EEOC to the pursuit of injunctive and not monetary relief on behalf of aggrieved individuals would severely impede its ability to protect the public interest against unlawful employment discrimination, and would effectively eradicate the efforts of Congress to provide meaningful enforcement powers to the EEOC." *EEOC v. Frank's Nursery*, 177 F.3d 448, 466 (6th Cir. 1999).

B. Contrary to the understanding of the Fourth Circuit, the Federal Arbitration Act and its policy favoring arbitration do

not provide any basis for limiting the authority of the EEOC "to secure appropriate relief, 'including reinstatement . . . with or without back pay,' for the victims of [employment] discrimination." *General Telephone*, 446 U.S. at 324.

The FAA—which was enacted almost a half-century before the federal anti-discrimination laws—"makes a written agreement to arbitrate '. . . valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.' 9 U.S.C. § 2." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

As the statutory language shows, "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "Accordingly, the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute." *Mitsubishi Motors*, 473 U.S. at 626. For, under the FAA, as under all contractual arbitration regimes, "a party cannot be required to arbitrate any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986).

It follows that nothing in the FAA's terms, and nothing in the FAA policy favoring arbitration—both of which draw their essence from the law of contracts—grant the parties to an arbitration agreement the right to limit the litigation authority conferred by a statute upon an independent third party.

As the court below correctly observed, "the EEOC is not a party to any arbitration agreement," Pet. App. 12a, and has not agreed to submit any matter to arbitration. Thus, the FAA provides no basis for applying that agreement to the EEOC.

The only arbitration agreement here is the arbitration provision in Waffle House's employment application, and it runs to the individuals who have completed the application and only to those individuals. That agreement, at its most, binds those individuals to proceed on their employment claims—including claims under the ADA—through arbitration rather than through their own private-party lawsuit. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. ___ (March 21, 2001).

By reason of the FAA, then, the charging party here is barred from exercising what would otherwise be his right to file a private-party Title VII lawsuit, and he may be barred from intervening in an EEOC lawsuit to independently press his claim. *See* 42 U.S.C. § 2000e-5(f)(1)(according such rights to "persons aggrieved" by discriminatory practices). In this case, the charging party has not so much as attempted to take either of these steps.

The one step the charging party has taken is to file charges with the EEOC alleging a Waffle House violation of the ADA. That step in no way offends the FAA, or the FAA policy favoring arbitration: "An individual . . . claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991).

Nor is the FAA's arbitration policy in any way offended by the EEOC lawsuit brought here. The sole point of the FAA policy favoring arbitration agreements is to bind the parties to an agreement to pursue the legal claims they otherwise have the right to pursue through court litigation through arbitration instead. The FAA and the FAA arbitration policy are not directed at third persons who are strangers to an arbitration agreement or at granting the contracting parties the power to place limits on third party litigation.

That being so—and the EEOC's Title VII public law enforcement litigation authority being separate and distinct from an aggrieved person's private-party law enforcement authority—the Fourth Circuit stretched the FAA and its arbitration policy far beyond their limits in making the Waffle House arbitration provision the predicate for a judicial limitation on the EEOC's litigation authority. Pet. App. 14a.

C. For the reasons just stated, we do not believe there is any cognizable conflict between the EEOC's public law enforcement authority to bring this case and the FAA policy favoring arbitration to be resolved by balancing the Title VII enforcement policy against the FAA's arbitration policy. But assuming that there is such a conflict, the proper balance is in favor of the Title VII enforcement policy and not, as the Court of Appeals concluded, against it.

The Fourth Circuit was of the view that "[t]o permit the EEOC to prosecute in court [a charging party's] individual claim [for reinstatement and back pay]—the resolution of which he had earlier committed by contract to the arbitral forum—would significantly trample this strong policy favoring arbitration," and that "only a stronger, competing policy could justify allowing the EEOC to do for [the charging party] what [he] could not have done himself." Pet. App. 14a. And, according to the court below, "[t]he EEOC's public mission to eradicate and to prevent discrimination . . . cannot outweigh the policy favoring arbitration when the EEOC seeks relief specific to the charging party who assented to arbitrate his claims," because "the public interest aspect of such a claim is less significant than an EEOC suit seeking large-scale injunctive relief" in that "the EEOC [is] seek[ing] primarily to vindicate private, rather than public, interests." *Id.* at 14a-15a. *See EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 301 (2d Cir. 1998)("in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree").

In other words, in order to generate a policy conflict between Title VII and the FAA, the court below had to treat the reinstatement/backpay remedies provided for by the statute as peculiarly individual in their nature and of less importance from a Title VII law enforcement perspective than the other remedies specified in the statute. That approach—which is contrary to the express terms of § 706, which do not so distinguish among the various remedies described there—is directly at odds with the Congressional purpose in granting the EEOC litigation authority.

As we have seen, a back pay order under Title VII is "a reparation order designed to vindicate the public policy of the statute." *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). *See Albemarle Paper*, 422 U.S. at 419; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 774-775 & n. 34 (1976). The EEOC does not seek such relief as the representative of the charging party, but rather as the public law enforcement agency charged with "the basic responsibility to achieve the objectives of Title VII." H.R. Rep. No. 92-238, at 14.

This Court has instructed that "backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper*, 422 U.S. at 421. The rule adopted by the Fourth Circuit frustrates both of these interrelated statutory purposes by making it impossible for unlawful discrimination to be completely redressed in a single enforcement proceeding brought by the EEOC. That, of course, significantly diminishes the incentives for employers to comply with the law in the first instance or, in the second, to come to effective conciliation agreements with the Commission curing violations.

Employer-employee arbitration agreements of the sort at issue in this case have become ubiquitous. *See, e.g., Cole v.*

Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997). And, as this case demonstrates, such agreements are commonly imposed on the entire complement of an employer's workforce. *Id.* at 1477 ("mandatory arbitration agreements in individual employees' contracts often are presented on a take-it-or-leave-it basis"). Thus, the decision below blunts the enforcement authority of the EEOC with respect to the numerous employers who require their employees to sign standard-form arbitration agreements by freeing such employers from the "reasonably certain prospect of a backpay award," *Albemarle Paper*, 422 U.S. at 417, in actions brought by the EEOC.

On any calculus, that harm outweighs the highly attenuated harm to the FAA arbitration policy of recognizing the legitimacy of a statutorily authorized Title VII public law enforcement suit by the EEOC—which as we have emphasized is not party to any arbitration agreement—that in substance parallels the private-party Title VII suit a discriminatee could have brought but for his arbitration agreement with the employer who committed the discriminatory practice. The employer, we would emphasize, has contracted for arbitration with his employees—and only with his employees—against (i) the background of the arbitration law, which makes it plain that the agreement does not apply to third persons not party to the agreement, and (ii) against the background of the Title VII law, which makes it plain that the EEOC has an independent public law enforcement authority "to secure appropriate relief, including 'reinstatement . . ., with or without back pay,' for the victims of discrimination." *General Telephone*, 446 U.S. at 324.

D. The Second Circuit, in reaching the same conclusion as the court below, relied more heavily on the theory that an individual charging party and the EEOC are in privity, asserting that "Congress intended the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights." *Kidder, Peabody*, 156 F.3d at 302. This

theory is as defective as the Fourth Circuit's Title VII/FAA conflict theory. Simply stated, "preclusion cannot apply because the EEOC and [the individual charging party] are not in privity, and because they do not possess identical causes of action or interests." *Frank's Nursery*, 177 F.3d at 463.[5]

The privity analysis in *Kidder, Peabody* is fatally at odds with this Court's decision in *General Telephone*, which as we have noted, squarely holds that "the EEOC is not merely a proxy for the victims of discrimination and . . . the EEOC's enforcement suits should not be considered representative actions." 446 U.S. at 326. It was on this ground that the Court *rejected* the proposition that "a judgment in the EEOC's suit . . . will be binding upon all individuals with similar grievances." *Id.* at 332. Rather, the Court suggested "that the courts can and should preclude double recovery by an individual" through such means as "requir[ing] any individual who claims under its judgment to relinquish his

[5] The Fourth Circuit. in the decision below, did not rely on the Second Circuit's privity analysis, perhaps, because that analysis "relied in large measure on the 'distinctive enforcement scheme of the ADEA.'" *Kidder, Peabody*, 156 F.3d at 301, quoting *EEOC v. United States Steel Corp.*, 921 F.2d 489, 494 (1990). In *U.S. Steel*, the Third Circuit emphasized that the Age Discrimination in Employment Act both "expressly authorizes aggrieved individuals to bring civil actions" and "provides that 'the right of any person to bring such actions shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under [the Act].'" 921 F.2d at 494, quoting 29 U.S.C. § 626(c)(1). The Third Circuit concluded "that Congress would not have crafted this enforcement scheme—on the one hand, creating an individual cause of action and, on the other, cutting off the individual's right to sue once the EEOC begins its action—unless Congress intended for the EEOC to serve as the individual's representative when it seeks to enforce that individual's rights." 921 F.2d at 494-495. Whatever merit these observations may have with respect to the ADEA, they have no application whatsoever to the Americans with Disabilities Act or to Title VII generally, neither of which provide for the termination of individual lawsuits upon the filing of an action by the EEOC.

right to bring a separate private action." *Id.* at 333.

Even accepting the proposition that "the doctrine of claim preclusion applies symmetrically to instances in which litigation by a representative precedes individual litigation and to those instances in which the opposite sequence occurs," *U.S. Steel*, 921 F.2d at 493, it follows from *General Telephone* that the EEOC, which is an independent litigant and not a representative, is not barred from seeking reinstatement/back pay relief for an individual by the result of an individual's action. Indeed, that conclusion follows *a fortiori*, for the argument against preclusion of the government's claim by the result of an individual's private-party lawsuit is even stronger than the argument against preclusion of the individual's claims by the government's lawsuit. *See Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) ("the Government is not barred by the doctrine of *res judicata* from maintaining independent actions asking courts to enforce federal statutes implicating both public and private interests merely because independent private litigation has also been commence or concluded."); *Restatement (Second) of Judgments* § 41, Comment d (1982) ("Where a private party is recognized as having a right to secure judicial redress with regard to a matter in which a public official or agency also has such a right, the private party's action is not ordinarily preclusive of an action by the official or agency.").

As we have explained, the statutory language refutes the notion, also relied upon by the Second Circuit, *Kidder Peabody*, 156 F.3d at 302, that "a prior private settlement may limit the scope of relief that the EEOC may seek on behalf of the settling employee," *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1543 (9th Cir. 1987). Section 706(f)(1) states that "[if] . . . the Commission has been unable to secure from the respondent a conciliation

agreement *acceptable to the Commission*, the Commission may bring a civil action against any respondent . . . named in the charge." 42 U.S.C. § 2000e-5(f)(1)(emphasis added). Obviously, then, the Commission is *not* limited in "bring[ing] a civil action" by a conciliation agreement that is *not* "acceptable to the Commission."

In regard to this point, the *Kidder, Peabody* opinion incorrectly describes three cases cited by this Court in *Gilmer* as standing for the proposition that "an individual's settlement or waiver of a claim under the ADEA preempted a subsequent EEOC action on that claim seeking damages for the individual." 156 F.3d at 301. But none of these cases involve any contention that the EEOC was preempted by a private-party settlement agreement, and none of them even remotely address this question. Rather, each one addresses whether an *individual's private party* settlement agreement bars a later action by *that individual*. *See Coventry v. United States Steel Corp.*, 856 F.2d 514, 522 (3d Cir. 1988); *Moore v. McGraw Edison Co.*, 804 F.2d 1026, 1033 (8th Cir. 1986); *Runyan v. National Cash Register Corp.*, 787 F.2d 1039, 1045 (6th Cir.), *cert. denied*, 479 U.S. 850 (1986). These cases are cited in *Gilmer* for the proposition that ADEA "disputes can be settled . . . without any EEOC involvement," 500 U.S. at 28, a statement which is indisputably true where the EEOC does not invoke its Title VII public law enforcement litigation authority but which has nothing to do with the binding effect of private settlements on the EEOC when the Commission does bring such a suit.

This is not to say that an individual's private party settlement has no effect on the back pay recovery in a suit brought by the EEOC. The statute expressly precludes double recovery by injured employees, 42 U.S.C. § 2000e-5(g)(1), and any amount previously received by an individual pursuant to a private settlement should undoubtedly be deducted from the back pay awarded to that individual in a

suit brought by the EEOC. Moreover, the amount recovered in a freely and fairly negotiated settlement may be given appropriate weight by the district court in determining the amount of lost wages. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 60 n. 21 (1974). But neither of these considerations has any application to the instant case where the charging party has neither received any money in settlement of his claim nor attempted to recover any money through arbitration. *See Frank's Nursery*, 177 F.3d at 465 ("Here, [the charging party] neither received satisfaction of her interests through settlement, nor agreed to give up her right to back pay.").

In the end, the Second Circuit's privity analysis rests on the mistaken idea underlying the Fourth Circuit's decision "that in seeking individual monetary relief, as opposed to class-wide injunctive relief, the EEOC does not represent the public interest to the same degree." *Kidder, Peabody*, 156 F.3d at 301.

CONCLUSION

The decision of the court of appeals dismissing the EEOC's claims for backpay, reinstatement and compensatory and punitive damages should be reversed.

Respectfully submitted,

JONATHAN P. HIATT
JAMES B. COPPESS
815 Sixteenth Street, NW
Washington, DC 20006

LAURENCE GOLD *
805 Fifteenth Street, NW
Washington, DC 20005
(202) 842-2600

* Counsel of Record